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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD MICHAEL NEUHART, Defendant and Appellant.	G055217 (Super. Ct. No. 16WF2412) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek Guy Johnson, Judge. Affirmed in part and remanded with directions.

Dacia A. Burz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Meredith White and Genevieve Herbert, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Richard Michael Neuhart of one count of first degree residential burglary (Pen. Code, §§ 459, 460, subd. (a)).[1] The trial court sentenced defendant to an aggregate state prison term of 22 years, which included two consecutive five-year terms for two serious felony priors pursuant to section 667, subdivision (a)(1). Defendant raises two issues on appeal. First, he contends the court erred by failing to instruct the jury on criminal trespass as a lesser included offense of burglary. Second, he claims the court erred by failing to instruct the jury on when a house is not inhabited. For the reasons stated below, we disagree with defendant's contentions and, accordingly, we affirm the judgment. However, we remand the matter for resentencing pursuant to Senate Bill No. 1393 that took effect January 1, 2019, which amended sections 667, subdivision (a) and 1385, subdivision (b), Statutes 2018, chapter 1013, sections 1-2, and provides trial courts with discretion to strike five-year serious felony priors.

I

FACTS

In 2016, Karen Harris hired First Team Realty to sell her Huntington Beach house for an asking price of $1,599,000. In October 2016, two real estate agents, Brian Bogs and Travis Schaeffer, hosted an open house for Harris. Harris was not present during the open house. Before she left her house that day, Harris cleaned her master bedroom. She also stored some valuables, including art work and a small wooden box containing her dog's ashes, in her master bedroom closet. When asked if she had several items in her closet, she testified, "Yes, I was moving."

Around 11:45 a.m., Bogs noticed defendant enter the house. Defendant wore his sunglasses inside and appeared to be wearing a fake mustache. He also kept his hand over his mouth. After quickly surveying the kitchen, defendant went upstairs to the

[1] All further undesignated statutory references are to the Penal Code.

master bedroom. Bogs waited a few minutes and then went upstairs to look for defendant.

Bogs found defendant in the master bedroom closet. Defendant's back was toward Bogs, and he appeared to be "fumbling around with stuff." Bogs asked defendant what he was doing, and defendant dropped what appeared to be a jewelry box. Defendant turned around and said, "Oh, nothing. I was just looking around." Bogs stated, "Well, it looked like you were doing something. What were you doing? Exactly what are you doing in here?" Bogs responded, "Nothing. I was just looking around." Bogs asked defendant to empty his pockets, and defendant pulled out a small screwdriver and a pair of tweezers.

Defendant then stated he wanted to leave and told Bogs to let him go. Although Bogs tried to detain defendant in the closet, he was unsuccessful. Defendant went to the bathroom, took off his fake mustache, and flushed the mustache down the toilet. He again tried to leave, but Bogs detained him in the master bedroom. Bogs yelled down to Schaeffer and told him to call the police.

Two police officers arrived and arrested defendant. One of the officers found a screwdriver and pair of tweezers in the master bedroom closet. The latch on the wooden box containing Harris' dog's ashes was turned up, and the lock and key for the box were on the carpet floor of the closet.

The police officers also searched defendant's car, an older Toyota, which was parked out of view from the house. In the compartment on the driver's side door, they found two bottles of Spirit Gum and Spirit Gum Remover. Spirit Gum is a glue used to attach costume items to a person's face.

The People's operative amended information alleged one count of first degree residential burglary (§§ 459, 460, subd. (a)). The information alleged: "[Defendant] did unlawfully enter an inhabited dwelling house, trailer coach, and inhabited portion of a building, inhabited by Karen H., with the intent to commit

larceny." The information also alleged: (1) a nonaccomplice was present during the offense (§ 667.5, subd. (c)(21)); (2) five prior strike convictions (§§ 667, subds. (d), (e)(2)(A), 1170.12, subds. (b), (c)(2)(A)); (3) two prior serious felony enhancements (§ 667, subd. (a)(1)); and (4) two prior prison term enhancements (§ 667.5, subd. (a)).

For the first degree residential burglary count, the trial court provided the CALCRIM No. 1700 instruction to the jury. The court also provided the CALCRIM No. 1701 instruction regarding burglary degrees. The CALCRIM No. 1701 instruction stated: "Burglary is divided into two degrees. If you conclude that the defendant committed a burglary, you must then decide the degree. [¶] First degree burglary is the burglary of an inhabited house or a room within an inhabited house. [¶] A house is inhabited if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged entry. [¶] All other burglaries are second degree. [¶] The People have the burden of proving beyond a reasonable doubt that the burglary was first degree burglary. If the People have not met this burden, you must find the defendant not guilty of first degree burglary."

The CALCRIM No. 1701 instruction did not include the following optional paragraph: "A [house] is not *inhabited* if the former residents have moved out and do not intend to return, even if some personal property remains inside." The trial court did not include this optional paragraph because the People asked the court to redact the language based on Harris' testimony that she lived in the house until January 2017. The court asked if defendant's counsel agreed, and defendant's counsel said, "Yes."

As noted above, the jury found defendant guilty on the first degree residential burglary count. The trial court sentenced defendant to an aggregate state prison term of 22 years as follows: (1) six years for the first degree burglary count, which was doubled to 12 years pursuant to the "Three Strikes" law (§§ 667, subds. (d), (e)(1), 1170.12, subds. (b), (c)(1)), and (2) two five-year terms for two prior serious felony enhancements.

II

DISCUSSION

A. The Trial Court Was Not Required to Instruct the Jury on Criminal Trespass

Defendant contends the trial court erred in failing to sua sponte instruct the jury on criminal trespass as a lesser included offense of burglary. Defendant is mistaken.

A trial court has a sua sponte duty to instruct a jury on a lesser included offense if there is substantial evidence indicating the defendant is guilty only of the lesser offense. (*People v. Shockley* (2013) 58 Cal.4th 400, 403.) "'"Substantial evidence" in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[]'" that the lesser offense, but not the greater, was committed.'" (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) We review the trial court's decision to not instruct on a lesser included offense de novo. (*Id.* at p. 581.)

"An uncharged offense is included in a greater charged offense if *either* (1) the greater offense, as defined by statute, cannot be committed without also committing the lesser (the elements test), *or* (2) the language of the accusatory pleading encompasses all the elements of the lesser offense (the accusatory pleading test). [Citations.]" (*People v. Parson* (2008) 44 Cal.4th 332, 349.)

Burglary is the entry of a dwelling with the intent to commit a theft or a felony. (§ 459.) Criminal trespass is the entry of a residence without the owner's consent. (§ 602.5, subd. (a).) Under the elements test, it is "well settled that trespass is not a lesser necessarily included offense of burglary, because burglary, the entry of specified places with intent to steal or commit a felony (§ 459), can be perpetrated without committing any form of criminal trespass (see § 602). [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 118, fn. 8.) In other words, a burglary can be committed by a person who has permission to enter a dwelling. (*People v. Lohbauer* (1981) 29 Cal.3d 364, 369.)

Regardless, defendant contends the accusatory pleading test was satisfied. The amended information alleged: "[Defendant] did *unlawfully enter* an inhabited dwelling house, trailer coach, and inhabited portion of a building, inhabited by Karen H., with the intent to commit larceny." (Italics added.) Defendant claims the nonconsensual entry required for trespass is included in the allegation that he unlawfully entered the house. He essentially argues an unlawful entry is necessarily an entry without consent. We disagree.

In a burglary, the entry is unlawful because the perpetrator intends to commit a felony. It is the perpetrator's state of mind that is dispositive rather than the owner's intent. (See *People v. Salemme* (1992) 2 Cal.App.4th 775, 780 ["'[O]ne [who enters a structure with the intent to commit petty theft or a felony] may be convicted of burglary even if he [or she] enters with consent'"].)

Here, the amended information alleged defendant unlawfully entered the house "with the intent to commit larceny." It did not allege he entered without Harris' consent. Thus, the burglary as pleaded could have been committed without committing criminal trespass. A criminal trespass accordingly was not included in the burglary charge under the accusatory pleading test, and the trial court was not required to instruct on criminal trespass. Because we conclude the court did not err, we need not address whether there was prejudice arising from any instructional error or substantial evidence supporting an instruction on criminal trespass.

B. The Trial Court Was Not Required to Instruct the Jury on the Optional Paragraph in CALCRIM No. 1701

Defendant contends the trial court also erred in failing to sua sponte instruct the jury on when a house is not inhabited. According to defendant, the court should have included the following optional paragraph from CALCRIM No. 1701: "A [house] is not

inhabited if the former residents have moved out and do not intend to return, even if some personal property remains inside."

As an initial matter, we conclude defendant forfeited this argument by failing to request inclusion of the optional paragraph in the trial court proceedings. When the People requested the trial court remove the optional paragraph, defendant's counsel agreed the language should be omitted. Thus, defendant forfeited any claim on appeal that the instruction needed clarification. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 ["'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language'"].)

Even assuming no forfeiture, the trial court did not err by giving CALCRIM No. 1701 with the omission of which defendant complains. A court has a sua sponte duty to instruct the jury on the essential elements of an offense (*People v. Flood* (1998) 18 Cal.4th 470, 480-481), and "'on the general principles of law governing the case'" (*People v. Michaels* (2002) 28 Cal.4th 486, 529). A "court's duty to instruct on general principles of law and defenses not inconsistent with the defendant's theory of the case arises only when there is substantial evidence to support giving such an instruction." (*People v. Crew* (2003) 31 Cal.4th 822, 835.) "We review defendant's claims of instructional error de novo." (*People v. Johnson* (2009) 180 Cal.App.4th 702, 707.)

Under section 460, subdivision (a), "[e]very burglary of an inhabited dwelling house . . . is burglary of the first degree." Section 459 states in pertinent part: "As used in this chapter, 'inhabited' means currently being used for dwelling purposes, whether occupied or not."

Although defendant claims "a critical issue arose [as to] whether Harris was using her home merely as a storage facility rather than using it for dwelling purposes," there was no evidence Harris had moved out of her house and did not intend to return.

Harris testified she was living at her Huntington Beach house on the day of the open house. She also testified she did not move out until after the house was sold in January 2017. This testimony established Harris was using the house as her residence regardless of whether she was in the process of moving or had items stored in her master bedroom closet. We accordingly find there was no substantial evidence warranting an instruction on when a house is not inhabited.

People v. Little (2012) 206 Cal.App.4th 1364, is on point. The defendant in *Little* burglarized a house during an open house. (*Id.* at pp. 1367-1368.) This court held the house was "inhabited" and explained: "The residence was still a residence and the homeowners continued to own it. There is no suggestion that the homeowners . . . had abandoned their home with no intention of returning. They were just temporarily absent at the time [defendant] was there [during the open house]." (*Id.* at p. 1370.)

Likewise, in *People v. Tessman* (2014) 223 Cal.App.4th 1293, defendant burglarized a house during an open house. Although the homeowner was not present at the open house, the court found the house was "inhabited" because the homeowner had her possessions in the house, slept in the house, and did not move out until after the house was sold. (*Id.* at p. 1298.)

Defendant argues *Little* and *Tessman* are distinguishable because "here, there was a question of fact whether the house was an uninhabited structure based on substantial evidence that Harris was merely using it as a storage facility while the property was being sold." Defendant also contends Harris' "testimony indicating that she was using the house as her living quarters was ambiguous." To the contrary, Harris clearly testified she was living in her house and did not move out until after it was sold three months later. While she suggested she had items in the master bedroom closet because she was moving, she also testified she stored items in the closet that were "of importance to [her] that [she] wanted put away from . . . where people would be walking

around [during the open house]." Thus, there was no substantial evidence she was using the house as a storage facility.

We also are not persuaded by defendant's reliance on *People v. Cardona* (1983) 142 Cal.App.3d 481 and *People v. Valdez* (1962) 203 Cal.App.2d 559. In those cases, the courts found the burglarized homes were not inhabited because the residents had moved out. (*Cardona*, at p. 483 ["Where . . . the residents have moved out without the intent to return, the house becomes uninhabited . . . . The continued use of that house for storage of belongings only was not sufficient to make the house inhabited"]; *Valdez*, at p. 563 ["[T]he dwelling in question was an unoccupied rental unit. No one was residing therein. . . . For this reason, we conclude that it then was uninhabited"].) Here, on the other hand, Harris was still living in her house at the time of the burglary.

Relying on *People v. Graham* (1969) 71 Cal.2d 303 and *People v. Giardino* (2000) 82 Cal.App.4th 454, defendant also argues "the trial court's instruction on the definition of 'an inhabited house' . . . was prejudicially erroneous because the incorporated statutory language of section 459 defining the term 'an inhabited house' was inadequate and misleading . . . ." The facts in those cases are distinguishable from the facts in this case. In *Graham*, defendant had kicked the victim, and the instruction for first degree robbery stated the defendant had to be "'armed with a dangerous or deadly weapon.'" (*Graham*, at pp. 310, 313.) The jury was not informed it "could conclude [the] shoe was a 'dangerous or deadly weapon' only if the jury could find that the shoe could be used in a dangerous or deadly manner and that the defendant intended so to use it." (*Id.* at p. 328.) Thus, our Supreme Court found the trial court did not adequately instruct the jury on first degree robbery. (*Id.* at pp. 328-330.) In *Giardino*, the instruction for rape by intoxication stated the jury had to find the victim was "'prevented from resisting the act by an intoxicating substance.'" (*Giardino*, at p. 464.) The appellate court found the trial court erred in failing to instruct the jury on the meaning of

"'prevented from resisting.'" (*Id.* at pp. 464-467.) The court explained: "[A]lthough the statutory language suggests that the factual issue is whether the intoxicating substance prevented the victim from physically resisting, the correct interpretation focuses on whether the victim's level of intoxication prevented him or her from exercising judgment." (*Id.* at p. 466.) The court accordingly held "the jury should have been instructed . . . to determine whether, as a result of [the victim's] level of intoxication, the victim lacked the legal capacity to give 'consent' . . . ." (*Ibid.*)

Here, unlike the jury instructions in *Graham* and *Giardino*, the CALCRIM No. 1701 instruction was sufficient. The instruction stated: "A house is inhabited if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged entry." Additional clarification was unnecessary because the evidence established Harris lived at her Huntington Beach house.

We accordingly find the trial court did not err by giving CALCRIM No. 1701 with the omission of which defendant complains. Because we conclude the court did not err, we need not address whether there was prejudice arising from any instructional error.

C. Remand for Resentencing

Defendant's sentence in this case includes two five-year prior serious felony enhancements pursuant to section 667, subdivision (a)(1). At the time of defendant's sentencing, the trial court had no power to strike or dismiss the five-year serious felony priors. Defendant filed a supplemental brief arguing he is entitled to the benefit of Senate Bill No. 1393. On September 30, 2018, the Governor signed Senate Bill No. 1393, which became effective January 1, 2019, and amends sections 667, subdivision (a) and 1385, subdivision (b), to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. The People concede the rule of retroactivity in *In re Estrada* (1965) 63 Cal.2d 740, applies to Senate

Bill No. 1393 and that we should remand to the trial court to exercise its discretion as to whether to strike the two five-year prior serious felony enhancements. We agree.

III

DISPOSITION

The matter is remanded to the trial court with directions to exercise its discretion whether to strike the two five-year prior serious felony enhancements pursuant to sections 667, subdivision (a) and 1385, subdivision (b). In all other respects, the judgment is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

GOETHALS, J.